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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 6, 1998

BY HAND

Ms. Magalie Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: CC Docket No. 97-219

Dear Secretary Salas:

Enclosed for filing in the above-referenced proceeding, please find an original and six (6) copies of the Reply Comments of the City of Dearborn, Michigan in Support of the Comments and Motion to Dismiss or Deny filed by the City of Rice Lake, Wisconsin.

Please contact the undersigned with any questions.

Respectfully submitted,
MILLER & VAN EATON, P.L.L.C.

By: Stephen J. Guzzetta

Enclosure

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
CHIBARDUN TELEPHONE COOPERATIVE, INC.	)	
CTC TELECOM, INC.	)	
	)	CC Docket No. 97-219
Petition for Preemption Pursuant to Section 253	)	
of the Communications Act of Discriminatory	)	
Ordinances, Fees and Rights-of-Way Practices of	)	
the City of Rice Lake, Wisconsin	)	

REPLY COMMENTS OF THE CITY OF DEARBORN, MICHIGAN IN SUPPORT OF THE COMMENTS AND MOTION TO DISMISS OR DENY FILED BY THE CITY OF RICE LAKE, WISCONSIN

The City of Dearborn, Michigan respectfully submits these reply comments in support of the Comments and Motion to Dismiss or Deny filed by the City of Rice Lake.[1] The Petition for Section 253 Preemption filed by Chibardun Telephone Cooperative, Inc. and CTC Telecom, Inc. (collectively, "Chibardun") should be dismissed because: (1) Chibardun has not demonstrated that the license agreement proposed by the City materially inhibits entry; and (2) the Federal Communications Commission ("FCC" or "Commission") lacks jurisdiction over Section 253(c) disputes. Moreover, to the extent that Chibardun's petition seems to suggest that the Commission should preempt the City's actions and Ordinance No. 849 because they are "discriminatory," it is defective because Section 253(c) does not create a private right of action.

[1] See Musical Heights, 17 R.R. 1101 (1958) (interpreting Part 1 of the Commission's rules to authorize the filing of a statement supporting a petition at the time in the pleading cycle that oppositions would be due).

Argument

I. THE COMMISSION LACKS JURISDICTION TO RULE ON CHIBARDUN'S CLAIM UNDER SECTION 253 OF THE COMMUNICATIONS ACT OF 1934.

A. The Language of Section 253 Prevents the FCC from Asserting Jurisdiction Over Local Right-of-Way Management Activities.

The Commission lacks statutory jurisdiction over the primary issue raised by Chibardun in its petition. A focal point of Chibardun's preemption petition is the fact that Rice Lake did not immediately grant the excavation permits that had been requested. Issuing permits is a core function of a local jurisdiction's right-of-way management powers. Accordingly, the City's actions with respect to Chibardun's permit requests fall within the ambit of Section 253(c), which preserves local control of public rights-of-way.

The text of Section 253 makes it absolutely clear that Congress withheld from the FCC any jurisdiction over matters falling within the "safe harbor" of subsection (c). Under Section 253(d), the scope of Commission jurisdiction extends only to "any statute, regulation, or legal requirement that violates subsection (a) or (b) . . ." Moreover, as the City notes in its comments, efforts in Congress to provide the FCC with jurisdiction over subsection (c) disputes were defeated. Instead, an amendment offered by Senator Gorton, which eliminated the FCC's ability to preempt matters involving local government authority over public rights-of-way, was adopted. Thus, the current language of Section 253(d) reflects a calculated decision by Congress to limit the preemption authority of the FCC to matters specified in subsections (a) and (b).

B. The Legislative History of Section 253 Reposes Jurisdiction Over Subsection (c) Disputes in the Courts.

It is also important to recognize that, in enacting Section 253, Congress affirmatively and unequivocally intended to bar the FCC from adjudicating disputes arising under Subsection (c).[2] In this regard, the legislative history of Section 253 states that:

> the alternative proposal [the Gorton Amendment] . . . retains not only the right of local communities to deal with their rights-of-way, but their right to meet any challenge on home ground in their local district courts . . . So my modification to the Feinstein amendment says that in the case of these purely local matters dealing with rights-of-way, there will not be jurisdiction on the part of the FCC immediately to enjoin local enforcement of those ordinances.[3]

This affirmative limitation clearly circumscribes the FCC's ability to interpret Section 253. In effect, the Commission is proscribed from rendering any conclusions about the scope or nature of a local government's public right-of-way authority. Thus, the FCC cannot credibly claim to possess any jurisdiction over the matters alleged in Chibardun's petition, at least until a court has ruled on the Section 253(c) issues that have been raised.

This denial of adjudicative jurisdiction to the FCC is not without parallel in the Communications Act. In several instances, Congress has limited the reach of the Commission's jurisdiction. For example, Congressional statements supporting Section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), explained that small independent telephone companies should not be subject to duplicative federal regulation by the FCC.[4] In addition, the legislative history of Section 16 of the Radio Act of 1927 makes clear that persons who have not

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[2] See the attached legislative history at pp. 9-10. This legislative history was made a part of the record in Classic Telephone, Inc., 11 FCC Rcd. 13082 (1996), and TCI Cablevision of Oakland County, Inc., FCC 97-331 (Rel. Sept. 19, 1997).

[3] Cong. Record for June 14, 1995, at S 8308 (printed in the attached legislative history at 10).

[4] Cong. Record for May 15, 1934, at S 8846.

sought a benefit from the FCC should be allowed to seek judicial relief from local circuit courts instead of the D.C. Circuit.[5]

The FCC cannot address the merits of Chibardun's claims and should dismiss Chibardun's petition for want of jurisdiction.

C. Even if the FCC Has Jurisdiction Over Section 253(c) Matters, Chibardun Has Not Stated a Claim for Relief Because the Text of Section 253(c) Does Not Create a Right in Chibardun or a Duty in Rice Lake.

Even if the Commission were to attempt to assert jurisdiction over Section 253(c) disputes, Chibardun's apparent attempt to use Section 253(c) as a substantive basis for preemption by the FCC must be rejected, because Section 253(c) does not establish an express or implied right of action under which Chibardun can assert a preemption claim. GST Tucson Lightwave, Inc. v. City of Tucson, 950 F. Supp. 968, 969-970 (D. Ariz. 1996), appeal pending 9th Cir. No. 97-394 PHXRGS. In other words, Section 253(c) does not create a right in Chibardun or a duty in Rice Lake. Rather, Section 253(c): (1) creates a safe harbor for local right-of-way management activities that might otherwise constitute a barrier to entry proscribed under Section 253(a); and (2) delineates the activities that fall within the safe harbor. Indeed, the text and the legislative history of Section 253 both clearly indicate that the purpose of subsection (c) is to preserve local control over right-of-way access and compensation. As Senator Gorton stated:

> the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern . . .[6]

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[5] Section 16 of the Radio Act was, for the most part, incorporated into Section 402 of the Communications Act of 1934, 47 U.S.C. § 402.

[6] Cong. Record for June 14, 1995, at S 8306 (printed in the attached legislative history at 9).

It is therefore evident that Section 253(c) is not intended to be an enforcement mechanism for telecommunications service providers. Accordingly, Chibardun's Section 253(c) claims are not actionable and cannot, as a matter of law, serve as a basis for preemption.

II. CHIBARDUN HAS FAILED TO PROVE THAT THE PROPOSED INTERIM LICENSE AGREEMENT IS A BARRIER TO ENTRY.

Chibardun's petition could be interpreted to allege that the license agreement proposed by Rice Lake prohibits or has the effect of prohibiting Chibardun's ability to provide telecommunications services. Chibardun, however, can point to no language in the draft license agreement which absolutely bars it from providing interstate or intrastate telecommunications services. This is because the purpose of the license agreement is to expedite Chibardun's entry into the City's telecommunications market. Consequently, Chibardun will only prevail if it can prove, based on credible and probative evidence, that the license agreement materially inhibited or limited its ability to compete in a fair and balanced legal and regulatory environment.[7] It is Dearborn's belief that Chibardun has not met its burden of proof.

Chibardun's allegations with respect to the proposed license agreement are rife with self-serving and unsubstantiated claims that do not explain and/or demonstrate how the company is effectively prohibited from providing telecommunications services. For example, Chibardun simply claims that the indemnity provision in the license agreement is unreasonable. There is no discussion of how the indemnity requirements, which are common to other right-of-way usage agreements, such cable franchises, materially inhibit or limit market entry. Apparently, in the absence of any supporting data, we are supposed to assume, *a priori*, that a standard indemnity

[7] TCI Cablevision of Oakland County, Inc., FCC 97-331, ¶¶ 98 and 101 (Rel. Sept. 19, 1997), reconsideration pending. In this case, the Commission denied TCI's Section 253 claims because

provision effectively prohibits the provision of telecommunications services. Chibardun's other claims require us to make the same "leap of faith." Simply put, Chibardun has proffered no credible or probative evidence that establishes an impermissible barrier to entry. Consequently, as in TCI Cablevision of Oakland County, Inc., there is no fully developed factual record which the FCC can use to render a well-informed decision. Accordingly, the Commission could not reasonably exercise any preemptive authority it might have to prevent the City from requiring Chibardun to sign an interim right-of-way use agreement.[8] Under the circumstances, the FCC should follow its Troy decision and decline to rule on Chibardun's Section 253 claims.

As a general rule, interim agreements facilitate rather than bar market entry. Although there is no proof that the license agreement provisions cited by Chibardun will function as entry barriers, there is convincing evidence which shows that contract provisions similar to those challenged by Chibardun do not necessarily prohibit or have the effect of prohibiting the provision of telecommunications services. Indeed, prior to enacting telecommunications ordinances, many local governments around the country have offered providers the opportunity to enter into interim right-of-way agreements containing requirements which are comparable to the obligations proposed in the draft Rice Lake agreement. By way of example, Metropolitan Fiber Systems of Baltimore, Inc. ("MFS") has entered into an interim right-of-way use agreement with the City of Takoma Park, Maryland, and TCG-Detroit has executed an interim agreement with the City of Dearborn, Michigan. Like the Rice Lake agreement, both interim agreements contain an indemnity provision which requires the indemnification of government

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there was no credible evidence which demonstrated that Troy's telecommunications ordinance prohibited entry. Id. at ¶ 99.

[8] Id. at ¶ 101 (stating that the Commission will exercise its preemption authority only upon fully developed factual records).

employees, agents and contractors. Additionally, the Takoma Park and Dearborn agreements require the submission of construction plans prior to the commencement of construction. The applicable provisions are analogous to the reporting requirement in Paragraph 9(a) of the draft Rice Lake agreement. Furthermore, based on certain provisions in the Takoma Park agreement, it is clear that MFS is expected to comply with a future telecommunications ordinance when it is enacted. Thus, the Takoma Park agreement is no different from the Rice Lake agreement in this respect. Moreover, the Takoma Park and Dearborn agreements require the relocation and removal of telecommunications facilities when necessitated by municipal public works projects (e.g., construction altering the grade of a street). These provisions are substantively similar to the relocation requirement set forth in Paragraph 12 of the Rice Lake Agreement. Accordingly, since MFS and TCG-Detroit have agreed to common right-of-way management requirements that are substantially equivalent to the "onerous" obligations challenged by Chibardun, it cannot be said that such provisions prima facie constitute insurmountable barriers to entry, especially in the absence of any compelling proof.

It should also be stated that Chibardun has not alleged any conduct on the part of Rice Lake that would violate the intent of Section 253(c). The fact that the Rice Lake has not required GTE North, Inc. to enter into a license agreement does not remove the City's actions from Section 253(c)'s safe harbor. Indeed, as explained by one of the sponsors of the Barton-Stupak amendment, which proposed language substantially similar to that ultimately agreement to by the House and Senate, "[l]ocal governments must be able to distinguish between different telecommunications providers . . ."[9] Accordingly, it is evident that Section 253(c) does not require the identical treatment of all telecommunications service providers. Consequently, Rice

[9] Cong. Record for August 4, 1995, at H 8460 (printed in the attached legislative history at 17).

Lake's allegedly disparate treatment of Chibardun is within the scope of protected right-of-way management activities. For this reason, the City's requiring Chibardun to sign an interim license agreement could not constitute an illegal barrier to entry.

Conclusion

For the reasons set forth in the City's Comments and Motion to Dismiss or Deny, and for the additional reasons set forth above, the Commission should dismiss Chibardun's Petition for Section 253 Preemption.

Respectfully submitted,

William Malone
Stephen J. Guzzetta

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January 6, 1998

Attachment

Certificate of Service

I, Stephen J. Guzzetta, hereby certify that I have cause to be mailed this day copies of the foregoing Reply Comments in Support of the Comments and Motion to Dismiss or Deny Filed by the City of Rice Lake, Wisconsin to the following persons:

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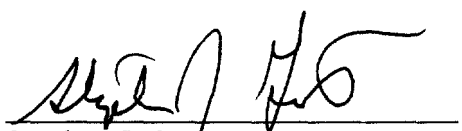

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By hand

December 13, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., # 222
Washington, D.C. 20554

Re: TCI v. Troy, file no. CSR-4790

Dear Mr. Secretary:

In conversations with the Commission staff last month, we were requested to furnish a detailed legislative history of various sections of the 1996 Act implicated in the above-captioned matter.

A copy of the legislative history responsive to that request is enclosed for filing.

Respectfully submitted,

William Malone

William Malone

Attorney for
PROTEC, Michigan Municipal League, Michigan Townships Association, United States Conference of Mayors, National League of Cities, National Association of Counties, City of Los Angeles, CA, City of Chicago, IL, and Michigan Communities

Enclosure

cc w/encl: Attached list
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MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

LEGISLATIVE HISTORY OF RIGHTS-OF-WAY PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996

SUMMARY

The Telecommunications Act of 1996 (P.L. 104-104) protects local governments' authority to manage their public rights-of-way and to receive fair and reasonable compensation from all telecommunications occupants of those rights-of-way. The specific provisions are in four sections of the 1996 Act that must be read together. They are: section 101 (adding section 253 -- Removal of Barriers to Entry); section 302 (adding section 653 -- Establishment of Open Video Systems); section 303 (amending section 621[b] -- Preemption of Franchising Authority Regulation of Telecommunications Services); and subsection 601(c) -- Federal, State and Local Law. The collective legislative history of these sections is important to understanding the intent of Congress to preserve the authority of local governments under the new legislation.

This legislative history traces the development of these provisions through the Senate passage of S. 652, the Telecommunications Competition and Deregulation Act of 1995, and the House's substitution of H.R. 1555, the Communications Act of 1995, culminating in adoption by both houses of final language in the conference agreement on the bills.

TABLE OF CONTENTS

I. SECTION 253

The text of new section 253 as enacted is as follows:

Sec. 253 REMOVAL OF BARRIERS TO ENTRY.

(a) IN GENERAL.- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [relating to universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY.- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION.- If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

In adopting this language, Congress wanted to create open market entry opportunities into all markets for all telecommunications vendors. Congress wanted to eliminate those state and local public utility licensing and regulatory practices that created legal monopolies or protected incumbent operators from competition. Since the new act presumes that all telecommunications can be competitive, it generally preempts state and local regulations that prohibit, or have the effect of prohibiting, service offerings in subsection (a).

Section 253 contains two "safe harbors" from this general prohibition. The first, in subsection (b), preserves state regulatory authority to impose universal service, public safety and welfare, and consumer protection requirements, as long as they are competitively neutral and consistent with section 254 (universal service). Subsection (d) gives the FCC authority to resolve only subsection (a) and (b) disputes.

The second "safe harbor" is subsection (c), which protects state and local authority to manage and receive compensation for local rights-of-way, if done on a competitively neutral and nondiscriminatory basis and the compensation is publicly disclosed. The language introducing section 253(c) ("Nothing in this section affects...") is strongly reminiscent of that introducing section 2(b) of the 1934 Act ("Nothing in this act shall ... apply ..."),[1] which the Supreme Court held to be an overriding denial of jurisdiction to the Commission. See Louisiana PSC v. FCC, 476 U.S. 355, 370, 374 (1986), a copy of which is attached hereto. Unlike subsection 253(b), the subsection (c) safe harbor does *not* fall within the authority given the FCC under subsection (d). Disputes under subsection 253(c) are, by deliberate decision of Congress, to be settled in the courts.

A. LEGISLATIVE HISTORY OF SECTION 253

[1] Subsection (b) of section 2 ("Application of Act") was originally added on the floor of the Senate to preserve prior existing non-federal jurisdiction. This is the same "section 2(b)" that the drafters of Sec. 243(e) of H.R. 1555 (part of the "MFS amendment", infra) had thought necessary to expressly override in their attempt to give the FCC jurisdiction over such matters.

SENATE

A draft of S. 652, the **Telecommunications Competition and Deregulation Act of 1995**, was circulated by Senator Larry Pressler (R-SD) on January 31, 1995. A draft Democratic alternative, the Universal Service Telecommunications Act of 1995, was circulated by Senator Hollings (D-SC) on February 14, 1995. Hearings were held on January 9, March 2, and March 21, 1995. No local government representatives were invited to testify.

At the hearings, Senator Kay Bailey Hutchison (R-TX) raised the concern of local governments that their right to manage and receive compensation for use of public rights-of-way by telecommunications providers be preserved.

The Commerce Committee marked up S. 652 on March 23, 1995. The bill as reported included an amendment by Senator Hutchison to new section 254 (which ultimately became section 253) as follows:

> (c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this section affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

S. 652 as reported by the Commerce, Science, and Transportation Committee also contained an amendment in subsection (d) that was not sought by Senator Hutchison, and for

which no Senator or committee staff member has publicly claimed responsibility, which gave the FCC the authority to preempt local government exercise of its authority under subsection (c) as well as to preempt state regulatory under subsection (b) and state and local authority under subsection (a). It read:

> (d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The language of Senator Hutchison's amendment is virtually identical to that finally enacted in 1996. But the language of the stealth amendment in subsection (d) in 1995 differs significantly from that finally enacted in 1996. The Committee Report (S. Rpt. 104-23) explained the 1995 language by merely repeating it: "Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation required is publicly disclosed. New section 254(d) requires the FCC, after notice and an opportunity for public comment, to preempt enforcement of any state or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsection (a) or other provisions of section 254." (Report, p. 35). The report language is ambiguous and could be read to imply that the focus of FCC preemption is to be barriers to entry.

Local governments were pleased with the affirmation of their authority over rights-of-way reflected in the Hutchison amendment that became subsection (c). They were very concerned, however, that the broad provision for FCC preemption under subsection (d) could act to wipe out that authority. The provision for FCC preemption of local right-of-way management and compensation authority in subsection (d) became the focus of local government concerns about S. 652 as it moved to the Senate floor in 1995.

The National League of Cities, United States Conference of Mayors, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors mounted a major campaign to eliminate the FCC preemption of local right-of-way management and compensation authority. They were supported by the National Governors Association and the National Conference of State Legislatures and by numerous individual cities and counties.

The Senate debated S. 652 on June 7, 8, 9, 12, 13, 14, and 15, 1995. Senators Dirk Kempthorne (R-ID) and Diane Feinstein (D-CA) offered a floor amendment to strike subsection (d) entirely. This amendment would have entirely eliminated FCC jurisdiction over barriers to entry and disputes under subsections (a), (b), and (c), leaving those disputes to the courts. The Feinstein-Kempthorne amendment failed on a narrow vote of 44-56 on June 14. The Senate then adopted, by voice vote, a substitute amendment supported by Senators Feinstein and Kempthorne and offered by Senator Slade Gorton (R-WA). The substitute was developed after negotiations between the committee members and Senators

Feinstein and Kempthorne. The Gorton amendment as adopted read as follows:

> (d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The purpose of the Gorton amendment was to preclude FCC jurisdiction over disputes involving local government authority over rights-of-way management and compensation, while preserving FCC jurisdiction over other forms of telecommunications business regulation by state or local regulators.

The floor debate over the Kempthorne-Feinstein amendment, together with the debate over the subsequently adopted substitute Gorton amendment, makes clear that the Senate's intent in adopting the Gorton amendment was to completely remove FCC jurisdiction over subsection (c) disputes about whether local government management of compensation requirements for rights-of-way are competitively neutral or nondiscriminatory. In explaining the Feinstein-Kempthorne amendment, Senator Feinstein stated that, for example,

> the FCC lacks the expertise to address the cities' concerns. As I said, if you have a city that is very hilly, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.

(Cong. Record for June 12, 1995, at S 8170). Senator Kempthorne also gave an example:

> When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back

> up, new sidewalks, curbs, gutters, paving of the main street. I tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.

(Cong. Record for June 12, 1995, at S 8173).

Senator Feinstein also raised some theoretical questions about the effect of not striking subsection (d):

> [I]s a city insurance or bonding requirement a barrier to entry? Is a city requirement that a company pay fees prior to installing any facilities to cover the cost of reviewing plans and inspecting excavation work a barrier to entry? Is the city requirement that a company use a particular type of excavation equipment or a different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry? Is a city requirement that a cable operator move a trunk line away from a public park or place cables underground rather than overhead in order to protect public health a barrier to entry?

(Cong. Record for June 12, 1995, at S 8173).

In explaining his amendment, which was adopted, Senator Gorton made clear that the amendment was intended to remove from FCC jurisdiction the very kinds of management and compensation requirements that Senators Feinstein and Kempthorne described. He stated:

> [T]he Feinstein amendment... does have a legitimate scope. I join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section. ... I am convinced that Senators Feinstein and Kempthorne are right in the examples that they give... and the amendment that I propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the

jurisdictions which are affected.

(Cong. Record for June 14, 1995, at S 8306). He added:

> [O]nce again, the alternative proposal [the Gorton amendment]... retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.

(Cong. Record for June 14, 1995, at S 8308).[2]

Senator Gorton also made clear that the kind of actions that would remain subject to FCC preemption authority under subsections (a) and (b) were very different: Grants of monopoly or exclusive rights in violation of subsection (a) ("This will say that if a State or some local community decides that it does not like the bill and that there should be only one telephone company in its jurisdiction or one cable television provider") (Cong. Record for June 14, 1995, at S 8308)); or anticompetitive actions under subsection (b) "when they have to do with the nature of universal service, when they have to do with the quality of telecommunications service or the protection of consumers" [Cong. Record for June 14, 1995, at S 8308]). "So my modification to the Feinstein amendment says that in the case of these purely local matters dealing with rights-of-way, there will not be jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances." (Cong. Record June 14, 1995 S 8306) (emphasis added).

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[2] This distinction as to venue is consistent with the distinction between Section 402(a) appeals, which may be taken to courts where the party appealing resides, and Section 402(b) appeals concerning federally issued radio licenses and the like, that have been taken to the court of appeals in the District of Columbia since 1927.

HOUSE

House Bill as Introduced

H.R. 1555, The Communications Act of 1995, was introduced on May 3, 1995. Section 101 contained language on rights-of-way management and compensation similar to language in H.R. 4103 which had been passed by the House in the 103rd Congress, as follows:

Section 243. Preemption

(a) REMOVAL OF BARRIERS TO ENTRY.- Except as provided in subsection (b) of this section, no State or local statute, regulation, or other legal requirement shall-- (1) effectively prohibit any carrier or other person from entering the business of providing interstate or intrastate telecommunications services or information service; or (2) effectively prohibit any carrier or other person providing interstate or intrastate telecommunications services or information services from exercising the access and interconnection rights provided under this part.

(b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of State or local officials to impose, on a nondiscriminatory basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, ensure that a providers's business practices are consistent with consumer protection laws and regulations, and ensure just and reasonable rates, provided that such requirements do not effectively prohibit any carrier or person from providing interstate or intrastate telecommunications services or information services.

(c) CONSTRUCTION PERMITS.- Subsection (a) shall not be construed to prohibit a local government from requiring a person or carrier to obtain ordinary and usual construction or similar permits for its operations if-- (1) such permit is required without regard to the nature of the business; and (2) requiring such permit does not effectively prohibit any person or carrier from providing any interstate or intrastate telecommunications service or information service.

(d) EXCEPTION.- In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

(e) PARITY OF FRANCHISE AND OTHER CHARGES.- Notwithstanding section

> 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services that distinguishes between or among providers of telecommunications services, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.

The chief proponent of subsections (c) and (e) of section 243 was Congressman Dan Schaefer (R-CO). The language in subsections (c) and (e) was generally referred to as the "MFS amendment," because that company had successfully sought inclusion of similar language in H.R. 4103 in the 103rd Congress.

Hearings were held on H.R. 1555 on May 10, 11, and 12, 1995. Local government representatives testified on May 11 and strongly opposed the language in new section 243 -- particularly that in subsections (c) and (e).

The Telecommunications and Finance Subcommittee marked up H.R. 1555 on May 17, 1995. No amendments were made to section 243 at the markup and the Subcommittee reported the bill with the same language in section 243 as introduced.

The full Commerce Committee marked up H.R. 1555 on May 24 and 25, 1995. At the full Commerce Committee mark on May 25, Congressman Bart Stupak (D-MI) raised the concern of local governments about the language in section 243. Congressman Stupak

offered and then withdrew an amendment to section 243 that was similar to the language adopted by the Senate Committee but without the pre-Gorton amendment provision for FCC preemption of local government right-of-way management and compensation authority. The language of the proposed Stupak amendment was as follows:

> STRIKE NEW SECTION 243 (a), (b), (c), and (e) beginning on Page 12, Line 6, AND INSERT THE FOLLOWING NEW SECTION: REMOVAL OF BARRIERS TO ENTRY.
>
> (a) IN GENERAL.- No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.
>
> (b) STATE AND LOCAL AUTHORITY.- Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 253, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Congressman Stupak withdrew his amendment amid assurances by the committee leadership that efforts would be made before the bill was reported to the floor to work out language that would respond to the concerns of local governments over the limiting effect of subsections (c) and (e) concerning construction permits and parity language. Congressman Joe Barton (R-TX) took the lead on the majority side on behalf of local governments in this